AGENDA ITEM E-1 b(ii) 8/20/12

ORIGINAL

CITY OF BROOKSVILLE
CITY COUNCIL
EXECUTIVE SESSION

PROCEEDINGS: Executive Session Re:
City of Brooksville v. Bond Safeguard Insurance Company Case No. CA-09-2388

DATE: April 19, 2010

PLACE: 201 Howell Avenue
Brooksville, Florida

REPORTED BY: C. GAIL DONATO, RPR
Notary Public - State of Florida at Large

APPEARANCES: DERRILL McATEER, ESQUIRE
JENNIFER REY, ESQUIRE
20 South Broad Street
Brooksville, Florida 34601
Counsel for City of Brooksville

COUNCIL MEMBERS:
LARA BRADBURN, Mayor
RICHARD E. LEWIS, Vice Mayor
JOE BERNARDINI
JOSEPH E. JOHNSTON, III
FRANKIE BURNETT

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1 P R O C E E D I N G S

2 MAYOR BRADBURN: All right. We move on
3 to the next item, City of Brooksville versus
4 Bond Safeguard Insurance Company. Ms. Rey?
5 MS. REY: This is Item D, City of
6 Brooksville versus Bond Safeguard Insurance
7 Company. It's Case Number CA-09-2388, for
8 the Fifth Judicial Circuit in and for
9 Hernando County, Florida.
10 Looking up on the map on the screen,
11 this next item deals specifically with
12 Cascades, Phases I, II, and then subsequent
13 III and IV. In particular, we're dealing
14 with performance bonds for Phase I, which
15 is the orange in color on the map.
16 The City filed suit, as indicated in the
17 memo, against Bond Safeguard to make demand
18 on the performance bond securing improvements
19 for Phase I. What is outstanding includes
20 the last lift of asphalt and certain
21 sidewalks. If you will indulge me a moment?
22 (Showing slides.)
23 MAYOR BRADBURN: Looks like a baseball
24 stadium.
25 MS. REY: Okay. We are dealing with

1 Phase I, which is essentially this section
2 here. And as it stands right now, this is a
3 sidewalk that should have been completed by
4 Levitt and Sons that has not. Here are two
5 sidewalks that should have been completed by
6 Levitt and Sons and were not. And then there
7 are sidewalks in here that were to have been
8 completed by Levitt and Sons and were not.
9 In addition, the City agreed -- the City
10 agreed to allow the developer to construct a
11 sidewalk on one side of the street throughout
12 the project. That's sort of the state of the
13 project now.
14 The City filed suit to demand the payment
15 on the performance bond to complete the
16 sidewalks and the second lift of asphalt.
17 Bond Safeguard has now supplied a settlement,
18 a completion and settlement agreement. This
19 is their initial offer. We have not made any
20 kind of changes or modifications.
21 At this point, in working with your
22 staff, it's been discussed that we allow
23 about six months for completion of
24 construction, and that we have asked Bond
25 Safeguard to actually complete construction

rather than paying the City. However, there's been some discussion with the current land owner. There are lots of concerns about the sub, the road base, on portions of the road because it's been incomplete for sometime. And their concern, because the homeowners will eventually maintain the road, is to insure that that road gets fixed properly and correctly.

It is unclear at this point whether that can be done within the current value of the bond. So Bond Safeguard has said, yes, we'll come in and complete the work. The homeowner says this is great, but we're mostly concerned about getting the road done. The property owner has indicated to the City that they are willing to assist in funding the costs for testing, analysis and engineering work so that they can have access to those documents, and they have offered to the City two things: One, to be as cooperative as necessary to get the road completed. And, two, to post a bond for the remaining sidewalks.

The property owner says why have the bond

company come in, complete the remaining sidewalks on the vacant lots, if we just may have to tear them up subsequently? So they said at this point they would not be opposed if the City wanted to agree that the sidewalk on vacant lots not be constructed.

I bring that before you today because we do need some direction. At this point it's our recommendation that we not allow the homeowner to post a separate bond to bond the remaining sidewalks, other than the ones I pointed out to you that are defaulted obligations. What we're talking about is the one side of sidewalks in the future.

MAYOR BRADBURN: Just for clarity, the landowner you're referring to is?

MS. REY: It's CASHP-1, which stands for Cascades at Southern Hills Plantation One.

MAYOR BRADBURN: Okay. But at this point, that's still a corporate entity, not necessarily the people who bought homes?

MS. REY: Correct.

MAYOR BRADBURN: At this point?

MS. REY: Correct.

MAYOR BRADBURN: Just want to make sure.

MS. REY: We would not necessarily recommend allowing the homeowner to do that, primarily because it sets a bad precedent, given your pending litigation with Westchester Fire Insurance in Phase II.

It's our recommendation that the work is bonded. You have a bond to secure completion of the work and that you require the bond company to complete the work. One possible compromise is if, again, if Bond Safeguard is amenable, one possible compromise is to say complete the road, complete those portions of sidewalks that are currently in default, and whatever balance of funds are left, based on an estimate, deposit with the City for the City to hold in escrow or trust for then the future completion.

What the City might consider is if they agree to post the cash, the City would relieve them of any maintenance obligation for the outstanding sidewalks that are not completed. And so that might be a happy medium between holding the bond company liable for the full face value of the bond completion of the work, and meeting the

1 homeowners' request to delay construction of
2 the additional sidewalks. Again, beyond
3 those that are default obligations.
4 MAYOR BRADBURN: My opinion is this: We
5 need the work done more than we need the bond
6 money, and though we want to make sure that
7 the work is quality. We know that there's
8 been degradation of the existing surface,
9 which means the base has been impacted. To
10 what extent, you know, let the experts tell
11 us that. But, you know, road first,
12 sidewalks second. And if we're going to
13 prioritize those projects, I would do road
14 first, sidewalk second, and I would rather
15 have a private entity do it at less cost than
16 the government.
17 COUNCILMAN JOHNSTON: Question? I know
18 I'm missing something. This may cause you to
19 digress into matters that are not related to
20 this necessarily, but why is it Phase II
21 thing, how does that impact -- seems to me
22 that you have the developer who is willing --
23 the current developer, the current landowner,
24 was willing to take out a bond for
25 completion of that. That would be a good

1 thing for the City, but you're saying it may
2 impact the way the other thing's done. Why
3 is that and how is that?
4 MS. REY: One of the legal arguments
5 that's been posed in the Westchester matter
6 is that the City failed to make demand from
7 the subsequent property owner to bond the
8 work. And, essentially, the City is arguing
9 there's a bond. The bond should be
10 responsible for completing the work that it
11 was -- that's outlined in that particular
12 bond. The City has not made a demand of this
13 particular homeowner to bond it. They have
14 volunteered. In the Westchester matter --
15 COUNCILMAN JOHNSTON: When you're saying
16 homeowner, you mean the developer?
17 MS. REY: I'm sorry, yes, the current
18 property owner. Current property owner. In
19 the Westchester matter the City had a bond.
20 They made demand on the bond to complete the
21 work. The surety is asking, well, why didn't
22 you ever make demand of the current property
23 owner to either post bond or complete the
24 work?
25 COUNCILMAN JOHNSTON: Well, we wouldn't

be making demand on the current property owner in Phase I. They're offering to do it themselves. It's not like we're demanding them to do that or making demand on them for that. They're willing to trade off a portion of that for completion of a different thing, and to relieve the current bond obligor from some of their duties. Seems to me that's not exactly apples and apples, but, I mean, I'm not the legal guy, so.

MS. REY: Well, and keep in mind that it's just one argument of a few that the City failed to make demand on the current property to meet obligations that they feel run with the land and were subsequently assigned or assumed by the next property owner.

COUNCILMAN JOHNSTON: To me it would seem like they're not subsequently assumed by the next property owner unless they pull out a bond. Otherwise, the existing bond runs with the land, not the obligation.

MS. REY: And I understand that, but it is a concern that we have in terms of establishing a precedent that may affect the Westchester litigation.

COUNCILMAN LEWIS: Mayor?

MAYOR BRADBURN: Yes, sir.

COUNCILMAN LEWIS: We're looking at, since the bond's been reduced, we're looking at $201,364.30 right now at the low end of it. And, to be honest, $201,000 isn't going to go that far in road work. I'm like the mayor, I'd rather see the work done.

As bad as I would hate to see those sidewalks completed, for them to sell those lots and develop them and come in there and bust them up by driving cement trucks and block trucks, I would be more in favor of having that bond meet its obligation doing the work. Put in those sidewalks as required by the bond. Hold them to that band. Hold their feet to the fire. And if we can do it all for 201,000, fine. But put our priorities on the road work first, on the swale work, like that, and any sidewalks that's in front of residential completed homes, and see how far that 201,000 goes.

And if it'll do all of it, fine. Do it all. And when they sell those properties, the builder that comes in is going to have to

clear the lot. There's going to be some damage to that, but they have it in other subdivisions. It's their responsibility before they get their CO to replace that sidewalk out there that was existing when they come in there. And they aren't going to destroy that whole sidewalk. They're going to work around it. They're going to cut out a section for the driveway, and they're going to work through that section as much as they can. Trust me, they'll work around it. They'll try to save as much concrete as they can. That would be my opinion. Thank you.

COUNCILMAN BURNETT: Madam Mayor? Just as an observation, isn't this the company that came before us, and I believe I was on council at that time, to make a decision whether to put sidewalks on both sides of the streets? And we agreed with them just to put it on one side. So, to me, they got a big break then because they didn't have to put sidewalks on both sides. They only had to put them on one side.

And my big problem is that we keep being lenient with people and we try to work with

them, and it always seems when it all comes down to the end, we the one suffer the bad cost for it. And that just was an observation, because I kind of remember that case there. So they saved a whole lot of money.

MS. REY: And your ordinance still -- you're absolutely correct in that this is the project where the ordinance was passed allowing for the single sidewalk on the one side of the street. The current property owner is a different property owner. They acquired it out of the bankruptcy process. And so they're taking -- they acquired the current development agreement through the ordinance and such.

So they're not asking for modification to that. They were just approaching us as a willingness and out of concern relative to the road base and whether or not the bond money was sufficient to complete all of the outstanding improvements.

We do have a list that was provided to you in the preliminary memo I did as to what improvements are outstanding, and it's our

goal to get the bond company to agree to that. But for purposes of settlement of the process, we wanted to bring the options to you for direction.

Keep in mind with respect to this completion agreement, staff has several requirements that are not incorporated in here in terms of use of a Florida certified or licensed contractor, as well as having engineer certifications to the City and allowing the City to do inspections and things. So there are a number of items that will be added to this settlement agreement, but we wanted to come before you today for further direction before we move forward in responding to Bond Safeguard with a counter offer.

MAYOR BRADBURN: Do you just need consensus, or do you need a motion?

MS. REY: My preference would be for a motion regarding direction.

COUNCILMAN LEWIS: I'll make the motion in favor.

COUNCILMAN BURNETT: Second.

COUNCILMAN LEWIS: For the completion of

1 the settlement agreement as per recommended
2 by our legal staff.
3 MAYOR BRADBURN: Is that with the
4 priority list?
5 COUNCILMAN LEWIS: With the priority list
6 of the streets being done first, as we have
7 discussed, and then the swales, and then the
8 sidewalks. And whatever money we have there,
9 I think, personally, we're probably going to
10 run short on money out there. I think it's
11 going to cost a lot more than what's in the
12 bond right now. Hopefully there will be
13 enough in there to do the streets, and I
14 think that's the main concern of the
15 homeowners in there right now.
16 MAYOR BRADBURN: We have a motion.
17 COUNCILMAN BURNETT: Second.
18 MAYOR BRADBURN: We have a second.
19 COUNCILMAN BERNARDINI: Clarification on
20 counsel's recommendations, legal counsel's
21 recommendation?
22 MAYOR BRADBURN: Your understanding of
23 the motion is?
24 COUNCILMAN BERNARDINI: What was the
25 recommendations?

1 COUNCILMAN LEWIS: For the completion of
2 the settlement agreement and right here. It
3 starts on Page Two of Three.
4 MS. REY: And, again, any final
5 agreement would come back for approval and
6 authorization for execution. But in terms of
7 negotiating with them as to a final
8 agreement, we need direction.
9 My recommendations are that the six
10 months completion date, that the bond company
11 be liable to complete all of the outstanding
12 improvements with the priority order that's
13 been set by the council members, to include
14 the road, the sidewalks that are currently in
15 default, and then completion of the remaining
16 sidewalks on other vacant lots, sort of in
17 that priority. That the licensed contractor
18 requirement be added, and that the agreement
19 provide for City inspection, as well as
20 certification by a PE to the City as to
21 completion and compliance with the existing
22 approvals.
23 MAYOR BRADBURN: With that, we have a
24 motion and a second. All in favor?
25 (Councilmen Bernardini, Lewis, Burnett,

Johnston and Mayor Bradburn indicating affirmatively.)

MAYOR BRADBURN: All opposed? Passes 5-0.

MS. REY: Any other questions regarding the City of Brooksville versus Bond Safeguard?

MAYOR BRADBURN: No.

(Proceedings concluded.)

1 STATE OF FLORIDA)
2 COUNTY OF HERNANDO)
3 I, CARLA GAIL DONATO, Registered Professional
4 Reporter, certify that I was authorized to and did
5 stenographically report the foregoing proceedings
6 and that the transcript is a true record of said
7 proceedings.
8 Dated this 13th day of April, 2011.
9
10 Carla Gail Donato
CARLA GAIL DONATO, RPR
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